No. 14,496

IN THE

United States Court of Appeals

For the Ninth Circuit

PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California,
Appellant,

vs.

SELVIE W. WELLS,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

STATEMENT OF THE CASE.

On April 7, 1954 Selvie W. Wells petitioned for a Writ of Habeas Corpus. On April 8, 1954, United States District Judge George B. Harris of the United States District Court for the Northern District of California issued an order directing Edwin B. Swope, Warden of the United States Penitentiary at Alcatraz Island, State of California, to show cause, if any, why a Writ of Habeas Corpus should not issue. On April 29, 1954, appellee, through his attorney,

moved to dismiss the petition for Writ of Habeas Corpus. On June 4, 1954 Judge Harris in a memorandum opinion and order concurred in by United States District Judge Louis E. Goodman ordered that a Writ of Habeas Corpus issue. An appeal was taken from the decision of George B. Harris, United States District Judge for the Northern District of California, allowing the writ to issue.

On July 18, 1955, the United States Court of Appeals for the Ninth Circuit entered its judgment reversing the decision of the District Court.

THE FACTS.

Appellee, after a plea of guilty, was on March 5, 1938 in the Western District of Texas, sentenced to 20 years on the first count of the indictment, 25 years on the second count of the indictment, to be consecutive to the first count, 25 years on the third count of the indictment, to be consecutive to the second count, and 20 years on the fourth count, to be consecutive to the third count.

The first count of the indictment charged appellee with taking money of an insured bank on March 5, 1938 by putting a certain Addie Walker in fear. The second count of the indictment charged appellee, at the time and place described in the first count of the indictment, with assaulting the said Addie Walker. The third count of the indictment charged appellee, at the time and place described in the first count of the indictment, with putting the life of the

said Addie Walker in jeopardy by the use of a dangerous weapon. The fourth count of the indictment charged appellee, at the time and place described in the first count of the indictment, with entering a bank with intent to commit a robbery. On August 4, 1941 appellee petitioned for correction of judgment and sentence to the United States District Court for the Western District of Texas. On August 20, 1941 this motion was denied. After appeal was taken from the denial of the motion, the Court of Appeals for the United States Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the trial Court entered on April 13, 1938. The Court of Appeals ordered that counts one and two of the 1938 judgment be set aside, but that counts three and four remain in full force and effect.

Appellee then moved the United States District Court for the Northern District of California for a Writ of Habeas Corpus. United States District Judge Louis E. Goodman dismissed this petition on the grounds that Wells had failed to present the matter to the sentencing Court, as required by 28 U.S.C.A. 2255. The petitioner then moved the United States District Court for the Western District of Texas for modification under that section. The United States District Court denied this motion. The Court of Appeals for the Fifth Circuit in the case of *Wells v. United States* reported at 210 Fed. (2d) 112, sustained the trial Court.

Petitioner then moved the United States District Court for the Northern District of California for a

Writ of Habeas Corpus, which was granted, and thereafter the United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court in granting said petition.

QUESTION.

Appellee presents one question, which we feel was inadvertently overlooked by the honorable judges of the United States Court of Appeals in their opinion reversing the District Court:

That Section 2255 of Title 28, U.S.C.A. is a procedural prerequisite to obtaining and filing a petition for Writ of Habeas Corpus, only and not an exclusive remedy.

ARGUMENT.

Section 2255, Title 28, U.S.C.A. is supposed to set forth remedies that are available on motion attacking a sentence. It is important to note in that regard that the first paragraph of said code section provides that the prisoner in custody "may move the Court which imposed the sentence". In this respect, it is important to note that the use of the word "may" is directory only and not mandatory. Using the term "may" can only indicate that this is an alternate approach to the rights allowed by habeas corpus, or at least a prerequisite to instituting habeas corpus proceedings in the jurisdiction wherein the petitioner is incarcerated.

Further, the third paragraph of said code section sets forth the fact that the Court shall "determine the issues and make findings of fact and conclusions of law with respect thereto." This can only mean that the findings of fact and conclusions of law are necessary to enable another Court to determine if a Writ of Habeas Corpus should issue, and providing a quick, efficient method of ascertaining certain questions of facts.

Michener v. U. S., 177 Fed. (2d) 422.

In this manner and examined from this aspect, 2255 provides a prerequisite to filing a petition for a Writ of Habeas Corpus. It has been determined and indirectly set out by many Courts and assumed by them in the course of determining the factual issues before them and the law that Section 2255 provides only a procedural prerequisite to being able to file a petition for a Writ of Habeas Corpus.

Wong v. Vogel, D.C., 80 F. Supp. 723;
Stidham v. Swope, D.C., 82 F. Supp. 931;
United States v. Calp, D.C., 83 F. Supp. 152;
St. Clair v. Hiatt, D.C., 83 F. Supp. 585;
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Fugate v. Hiatt, D.C., 86 F. Supp. 22;
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Howell v. United States, 4 Cir., 172 F. (2d) 213;

United States v. Meyers, D.C., 84 F. Supp. 766;
United States v. Lowery, D.C., 84 F. Supp. 804.

This view is further borne out by the case of *Stidham v. Swope,* 82 Fed. Supp. 931, wherein C. J. Denman said:

> "Petitioner now seeks to file an amended petition purporting to set forth that he has complied with the provisions of 28 U.S.C.A. Section 2255. This section provides a complicated and time consuming condition precedent to the filing of a petition for a writ of habeas corpus. It requires a motion to the sentencing court upon which are to be litigated the issues which may be later presented to the judge or court by the petition for the writ. Either party may appeal from the decision on the motion.
>
> This procedure by motion does not purport to be a substitute for the writ, since the party is not required to be produced before the sentencing court, and he can be transported and appear there as party and as witness only by the exercise of the judicial discretion of that court.
>
> The last sentence of section 2255 provides that the court or judge receiving a petition for the writ need not require the performance of such a condition precedent to its entertainment if 'it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.'
>
> Here the petitioner is in Alcatraz Penitentiary upwards of 1,500 miles from the sentencing court. If petitioner be taken there, it will be with two guards from whom time consuming arrangements must be made. When they are provided there

must be railroad reservations. It well could be two weeks before petitioner is in jail in Missouri. There must be found an attorney who must study the law and facts and prepare petitioner's motion, then a hearing with the petitioner and other witnesses appearing. If the decision be favorable to the petitioner, the United States, the adverse party in the sentencing court, in its appeal as in a habeas corpus proceeding may consume months of time, many months if the appellate court be in vacation.

If the petitioner be not taken to Missouri, the sentencing court there must appoint an attorney to represent him. That attorney in Missouri must correspond with his client in California to learn the facts and study the law in his case before preparing his motion. The motion, when prepared probably several weeks later, will be filed. Then the motion must be served upon the United States attorney, when the trial and likely appeal will follow.

If the decision be adverse in the Missouri proceeding and the petitioner be found wrongly imprisoned when the habeas corpus proceeding is decided, every day of the long delay before the latter petition may be presented to me is wrongfully taken out of his free life.

It is my opinion that the habeas corpus proceeding recognized by Article I, Section 9 of the Constitution does not permit such continued imprisonment prior to the entertainment of a petition seeking the writ. The constitutional writ of habeas corpus is that of England as it was in 1789. *United States v. Wong Kim Ark,* 169 U. S. 649, 655, 18 S. Ct. 456, 42 L. Ed. 890; *Ex*

parte Grossman, 267 U. S. 87, 108, 45 S. Ct. 332, 69 L. Ed. 527, 38 A.L.R. 131; *Dimick v. Schiedt,* 293 U. S. 474, 478, 55 S. Ct. 296, 79 L. Ed. 603, 95 A.L.R. 1150. It then rested on the Act of 31 Charles II, 1679. Its preamble 'recited that great delays had been used in making returns to writs of habeas corpus in criminal or supposed criminal cases. To remedy this s. 1 of the statute enacted that in such cases the return should be made within three days after the service of the writ if the place where the prisoner is detained is within twenty miles from the court, and if beyond the distance of twenty miles and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days after the delivery of the writ, and not longer. * * *' Halsbury Laws of England; cf. *Ex parte Baez,* 177 U. S. 378, 388, 20 S. Ct. 673, 44 L. Ed. 813.

The present section 2243 of the Judicial Code is a codification of the Act of February 5, 1867, 14 Stat. 385, and accepts this Charles II prevention of delay. It provides that the writ must issue 'forthwith'. The Alcatraz Warden, being within ten miles of my chambers, must make his return in three days of the Act of Charles II, unless for good cause additional time not exceeding twenty days be allowed. To this has been added the requirement that the cause shall be set for hearing within five days unless for good cause additional time be allowed. The allowance of such time is controlled by the general provision that 'The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.'

> For these reasons the motion in Missouri to vacate petitioner's sentence is 'inadequate and ineffective to test the legality of (petitioner's) detention.' It is in no way a writ of habeas corpus and prevents the summary proceeding of the writ provided in the Constitution."

As yet there still has been no case determined by the United States Supreme Court where the issue of constitutionality of Section 2255 has been squarely presented and decided. The mere fact that other jurisdictions might have determined matters before them based on an assumption that 2255 is constitutional are not cases supporting the constitutionality of said section. It is a well known principle of law that the constitutionality of any statute or law will not be decided unless that issue is presented to the Court and there is a need in determining the question to also determine constitutionality of that particular law or statute.

In the cases cited by the learned Court in its opinion, appellee respectfully brings to this Court's attention that the case of *Jones v. Squier* is not a true test of the constitutionality of this section inasmuch as the petitioner therein had not filed his application under this section prior to seeking a Writ of Habeas Corpus. In fact the decision presupposes that action under 2255 is prerequisite to filing a petition for a Writ of Habeas Corpus.

Barrett v. Hunter, 180 F. (2d) 510 (Cir. 10), might be some support to the Court's opinion, but we again

quote the following paragraph which we believe is particularly applicable to this case:

> "Section 2255 does not in our opinion apply to applications for a writ predicated on fact arising after the imposition of sentence, such as, for example, where the sentence has been fully served, and the prisoner is unlawfully thereafter detained in custody."

The main case cited by the Court is that of *Winhoven v. Swope*, 195 F. (2d) 181 (Cir. 9), but in that case it appears that the petitioner had been sentenced by the District Court of the Ninth District. It appears that this was not a case involving a person who was sentenced by a Court of one district and incarcerated within another district. From the opinion it appears that the sentencing Court is also the Court to which any Writs of Habeas Corpus would have to be filed. This is shown from the fact that the attorney for the petitioner asked the Court to consider the petitioning for a Writ of Habeas Corpus as a second motion under Section 2255.

We feel therefore that the cases cited by the Court in its decision do not face the issue presented by the facts of this case.

It (habeas corpus) has been the greatest bulwark of freedom against tyranny, oppression and injustice.

> "The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints, upon personal liberty. . . . The most important result of such usage has been to afford

> a swift and imperative remedy in all cases of illegal restraint upon personal liberty."
>
> *Price v. Johnston,* 334 U.S. 266, 269, 283, 68 S.Ct. 1049, 1092.

Any statute which might tend to weaken its efficiency or delay its availability or make its use more difficult should be carefully considered and construed liberally in the light of its history and its benign purposes.

> "Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ. . . . Only in that way can we give substance in this case to our previous statement that 'dry formalism should not sterilize procedural resources which Congress has made available to the federal courts.' "
>
> *Price v. Johnston,* 334 U.S. 283, 284, 68 S.Ct. 1059.

We felt that inasmuch as the Court did not discuss the second question presented in our original reply brief, to-wit:

> "Can there be consecutive sentences for 'entering a bank with intent to commit bank robbery and putting in jeopardy the life of a person by the use of a dangerous weapon'?"

and from the further fact that this Court set forth in its opinion that petitioner should seek executive

clemency, there is no need or necessity to brief this point, inasmuch as the law would be in our favor.

We respectfully urge the Court to grant this petition for rehearing.

Dated, San Francisco, California,
August 17, 1955.

Respectfully submitted,
MORRIS M. GRUPP,
ALBERT E. POLONSKY,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
August 17, 1955.

MORRIS M. GRUPP,
Of Counsel for Appellee and Petitioner.